THE INSULAR CASES

IN the last term of the Supreme Court there were argued several cases involving the right of the United States to collect duties on merchandise passing between the mainland, and the islands occupied by them in the course of the late war, and afterwards ceded to them. At the close of the term the Court decided all but two of these Insular Cases as they are called.[1] The opinions cover more than two hundred pages. They discuss and suggest many far-reaching questions, some of them novel. Their prophetic, political and historical passages do not always elucidate legal principles, though the governing law of the cases is the broadest and least technical in all our jurisprudence. They disclose nicely balanced and vigorously defended differences of opinion, going to the very root of our theories of government and public conduct; and most of the judges deem the leading judgments irreconcilable.[2]

My comment on the Insular Cases will not cover every question considered. My criticism may savor of prepossession so far as it is based upon views I advocated before the cases were decided, some of them, indeed, before the Treaty of Paris was signed;[3] views rejected in part by some of the judges, but not condemned by a united Court. But I shall present the salient features of the cases with such comment as my convictions dictate.

[1] They are reported in Volume 182 of the Supreme Court Reports as follows: De Lima *v.* Bidwell, p. 1; Armstrong *v.* U. S., p. 243; Dooley *v.* U. S., p. 222; Downes *v.* Bidwell, p. 244; Goetze *v.* U. S., p. 221; Crossman *v.* U. S., p. 221 (an Hawaiian case); see also Huus *v.* Steamship Co., p. 392. The cases undecided are: Dooley *v.* U. S. (No. 2), and Pepke *v.* U. S. (the Fourteen Diamond Rings case).

[2] See 182 U. S., pp. 201, 220, 239, 286.

[3] A Note on the Question of the Philippines, October 15, 1898; Constitutional Aspects of Annexation, *Harvard Law Review*, January, 1899; *Congressional Record*, January 11, 1899; Notes on the Law of Territorial Expansion, *Congressional Record*, May 31, 1900; The Law and Policy of Annexation, Longmans, Green & Co., 1901. I have referred to this book (cited as "Annexation") for a fuller discussion of some of the questions noted in this article.

Interesting comments on the Insular Cases are made by Hon. George F. Edmunds and Hon. George S. Boutwell, in the *North American Review* for August; by Judge Baldwin in the *Yale Review* for August; by Hon. Charles E. Littlefield in an address before the American Bar Association, and by Professor Burgess, of Columbia University, in the *Political Science Quarterly* for September.

I.

The leading judgments in the Insular Cases are:

I. Prior to the exchange of ratifications of the treaty of Paris the United States military authorities in occupation of Porto Rico lawfully imposed duties on goods imported from the United States.[1]

To this all the judges assented, for the reason that Porto Rico was then merely foreign territory in our military possession.

II. After the exchange of ratifications, and prior to the passage of the Foraker Act (April 12, 1900), the United States authorities erred in enforcing the Tariff Act against goods brought to our mainland from Porto Rico,[2] and in imposing duties on goods brought to Porto Rico from our mainland.[3]

These judgments were approved by a bare majority of the judges, whose united opinions were voiced in each case by Justice Brown.

III. The Government is not obliged to refund duties collected under the Foraker Act on goods brought from Porto Rico to our mainland.[4]

Again the judges divide five to four, but Justice Brown is now ranged for the judgment with the four judges who dissented from the opinions of the Court delivered by him in the De Lima and Dooley cases, and these judges now condemn the reasons employed to support this judgment, which they support for antagonistic reasons. Here is remarkable discord and it is important to consider its effect. The object of a suit at law is a final judgment which binds the parties without regard to the reasons on which it may be founded. The permanent interest in a suit depends usually upon an opinion of the Court disclosing the reasons for its judgment. When the judgment is supported by clear and harmonious reasoning it is a vehicle for a principle of law. Discordant reasoning leaves

[1] Dooley *v.* U. S., 182 U. S., 222.

[2] De Lima *v.* Bidwell, 182 U. S., 1.

[3] Dooley *v.* U. S., 182 U. S., 222.

[4] Downes *v.* Bidwell, 182 U. S., 244.

it a naked order addressed to the parties, without the opinion of the Court which is needful to promulgate an authoritative principle.

The distinction between the transitory interest of a judgment and the authority of an opinion is suggested in a series of cases in the Supreme Court. In Ogden *v.* Saunders,[1] the first question was whether a State legislature is forbidden by the Federal Constitution to pass a bankruptcy act. Four judges, including Justice Johnson, answered in the negative; three, including Chief Justice Marshall and Justice Story, dissented. Thus the question was resolved in favor of the States. The second question was whether a certificate of discharge in bankruptcy was effective against a citizen of another State. Again the judges divided four to three: Justice Johnson, supported by the three judges who had dissented on the first question, held that the certificate was not effective, and commenced the opinion by saying, "I am instructed by the majority of the "Court finally to dispose of this cause. The present majority "is not the same which determined the general question on "the constitutionality of State insolvent laws with reference "to the violation of the obligation of contracts. I now stand "united with the minority in the former question, and there-"fore feel it due to myself and the community to maintain "my consistency."[2] A few years later William Wirt asked the Court whether Justice Johnson's second opinion in Ogden *v.* Saunders stood as the opinion of the Court,[3] evidently desiring to argue the question there discussed as still an open one, on the theory that the concurrence of the judges who had dissented on the main question was merely in the judgment, and not in the reasons. Chief Justice Marshall replied for the Court: "The judges who were in "the minority of the Court upon the general question as to "the constitutionality of State insolvent laws concurred in "the opinion of Mr. Justice Johnson in the case of Ogden *v.* "Saunders. That opinion is therefore to be deemed the "opinion of the other judges who assented to that judgment. "Whatever principles are established in that opinion are to

[1] 12 Wheaton, 213.

[2] 12 Wheaton, 358.

[3] Boyle *v.* Zacharie, 6 Peters, 348.

" be considered as no longer open for controversy, but the " settled law of the Court." Justice Story, delivering the opinion of the Court in Boyle *v.* Zacharie,[1] said, " The " ultimate opinion delivered by Mr. Justice Johnson in the " case of Ogden *v.* Saunders, 12 Wheaton, 213, 258, was " concurred in and adopted by the three judges who " were in the minority upon the general question of the " constitutionality of State insolvent cases, so largely dis- " cussed in that case. It is proper to make this remark in " order to remove an erroneous impression of the bar that it " was his single opinion, and not of the three other judges " who concurred in the judgment. So far as decisions upon " the subject of State insolvent laws have been made by this " Court they are to be deemed final and conclusive." Justice Clifford prefaces a comment on these cases by saying, " Misapprehension existed, it seems, for a time whether the " second opinion delivered by Mr. Justice Johnson in that " case [Ogden *v.* Saunders] was, in point of fact, the opinion " of a majority of the Court, but it is difficult to see any " ground for such doubt. Referring to the opinion, it will " be seen that he states explicitly that he is instructed to dis- " pose of the cause, and he goes on to explain that the " majority on this occasion is not the same as that which " determined the general question previously considered."[2]

I have reviewed these cases at some length in order to show how clearly the Supreme Court contemplates the possibility that a judgment may not carry an authoritative opinion. How completely this possibility is realized in the Downes case appears in the following excerpts from the official report: " Mr. Justice Brown * * * announced the conclusion and judgment of the Court." " Mr. Justice White, with whom concurred Mr. Justice Shiras and Mr. Justice McKenna, uniting in the judgment of affirmance." Then Justice White commences his opinion by saying: " Mr. Justice Brown, in announcing the judgment of " affirmance, has in his opinion stated his reasons for his con- " currence in such judgment. In the result I likewise con- " cur. As, however, the reasons which cause me to do so

[1] 6 Peters, 635, 643.

[2] Baldwin *v.* Hale, 1 Wallace, 223, 230.

" are different from, if not in conflict with those expressed " in that opinion, if its meaning is by me not misconceived, " it becomes my duty to state the convictions which control " me." And Justice Gray says: " Concurring in the judg- " ment of affirmance in this case, and in substance agreeing " with the opinion of Mr. Justice White, I will sum up the " reasons for my concurrence in a few propositions, which " may also indicate my position in other cases now standing " for judgment."

The several opinions plainly expose the reasons for these cautionary statements. Justice Brown bases the judgment on the proposition that the Constitution cannot be effective in territory within our sovereignty, but beyond the States, without some action by Congress; but this is emphatically denied by Justice White and his associates, and also by the four judges who dissent from the judgment. Justice White and his associates base the judgment on the proposition that the territory acquired from Spain will not become domestic until it shall be definitely " incorporated " through the consent of Congress; but this is denied by Justice Brown, and also by the four judges who dissent from the judgment. Could Justice Brown be convinced that the Constitution is effective beyond the States, he would not hesitate, it seems, to apply its provisions to Porto Rico as a part of our domestic territory. Could Justice White and his associates be convinced that Porto Rico is domestic territory, they would not hesitate, it seems, to apply the Constitution to the full extent. To complete the disparagement of Downes *v.* Bidwell, a scrutiny of all the opinions in the Insular Cases shows that each of the two propositions separately advanced to sustain the judgment is actually condemned by a majority of the judges.

Justice McKenna thus admonishes his brethren of the majority in the De Lima case: " If other departments of the Government must look to the judicial for light, that light should burn steadily. It should not, like the exhalations of a marsh, shine to mislead."[1] This reproach cannot be turned against the opinions approving the judgment in the Downes case. These do not " shine to mislead "; they emit no guiding light. When we have read them, we know that

[1] 182 U. S., 205.

this particular taxpayer has lost his suit; we do not receive a principle of the law of taxation.

The judgment in Downes *v.* Bidwell binds the plaintiff. It may be accepted by Congress as a left-handed endorsement of a temporary fiscal policy. More cannot be said in its favor. Because it establishes no principle of law, it does not encourage Congress to duplicate for the Philippines the customs *régime* instituted temporarily for Porto Rico. For this reason it has not the usual effect of a judgment for the Government in a "test case"—it does not forbid other persons to press similar claims. Whether Porto Rico is a part of the United States within the meaning of the constitutional provision in regard to uniformity of customs duties is still a debatable question; and if it shall be presented to the Court again there will be no opinion of the Court to be followed, or reversed, or explained. There will be several opinions of the judges to be examined. The opinion of the Chief Justice, and of Justices Harlan, Brewer and Peckham, will certainly be entitled to equal consideration with the others. It deserves the approbation of the Court.

II.

Having considered these particular judgments of the Court in the Insular Cases, let us examine the several opinions for information concerning the power of the United States to enlarge their dominions, the relation of acquired territory to the republic and the relation of the Constitution to acquired territory.

All the judges affirm the power of the United States to acquire territory: All agree that Porto Rico was duly acquired: Then unity disappears.

The judgment in the De Lima case was approved by a bare majority of the judges, but it carries the opinion of the Court because each judge concurred in the essential and sufficient proposition that territory in the condition of Porto Rico is not 'foreign' within the meaning of our Tariff Act. By parity of reasoning it appears that it is

not "foreign" within the meaning of other important statutes, notably the immigration laws.

A narrow view of the De Lima case might disclose merely a declaration of a rule of statutory construction, but viewing it broadly, and reading with it the opinion of the same judges in the Dooley case we understand that the Court announces a very important rule of public law. The Court says in the Dooley case, that upon "the conclusion of the Treaty of Peace and the cession of the island to the United States * * * Porto Rico ceased to be a foreign country and the right to collect duties on imports from that island ceased. We think the correlative right to exact duties on imports from New York to Porto Rico also ceased."[1] Here is no rule of statutory construction, but a statement of the principle, already suggested in the De Lima case, that land occupied in virtue of a treaty of cession is no longer foreign; and if not foreign, then domestic for as the Court says in the De Lima case: "No act [of Congress] is necessary to make it domestic territory, if once it has been ceded to the United States."[2]

The Administration, though signally defeated in its contention that after the ratification of the Treaty of Paris Porto Rico remained foreign territory for purposes of taxation, still persists in taxing commerce between the Philippines and our mainland. The excuse for this course is that the Supreme Court has not yet decided the Pepke case, one of the first of the Insular Cases to be argued, and involving the right to collect duties on merchandise brought here from Manila. The motive for this course is not, I am sure, the "protection" of our industries against Philippine competition. Nor is it merely the continued enjoyment of a particular kind of insular revenue. Recalling that the Administration has assumed to be the sufficient government of the Philippines, and has appointed agents at pleasure with powers of its own devising, it would seem that the Administration continues its tariff policy in order to justify to itself the hope that the Court will sustain this policy in

[1] 182 U. S., 234.
[2] 182 U. S., 198.

the Pepke case upon grounds sufficiently broad to confirm its fundamental position that the Philippines are a province where the executive department rightfully makes, expounds and executes the laws unchecked, save by the limitations imposed by Congress[1] on grants of franchises, and on sales and leases of public lands and mining and timber rights.

Upon what principle of law can the Philippines be thus radically distinguished from Porto Rico? Our rights to possess each country were secured by one treaty and in substantially similar terms; but let it be admitted that, in point of public law, these may be in themselves naked rights, to be perfected by some act of possession before the new status of the territory shall be fixed. If, then, the Philippines shall be adjudged foreign, while Porto Rico is domestic territory their differentiation must be based upon the assumption that the United States have not there perfected their treaty right. And, if they have not, their failure is not attributable to lack of will, nor to any opposition from Spain; it must be attributed to the armed resistance of islanders. This position seems to be maintained by the Administration in a communication from Secretary Root to Governor Taft in the Philippines where we read: "the most obvious distinction between the status of Porto Rico and the Philippines, after the cession, indicated in the opinions of the Court, is in the fact that Porto Rico was at the time of the cession in full peaceable possession, while a state of war has continued in the Philippines. As the question of the President's power to impose duties in the Philippine Islands under existing conditions of military occupation has not been decided by the Court, the President has determined to continue to impose duties as heretofore."[2]

The asserted distinction between Porto Rico and the Philippines has been pressed since, and because of the decision in the De Lima case. The Pepke case, which it is hoped will establish the distinction, was argued for the Government in connection with one of the Porto Rico cases, and

[1] 31 U. S. Statutes at Large, p. 910.

[2] Cited in a letter of Henry L. Nelson, Esq., in N. Y. *Evening Post*, August 20, 1901.

the argument proceeded on the theory that each country was equally, and for substantially the same reasons "foreign" to the United States.

In one respect the Administration would doubtless be gratified by an adjudication that the Philippines are not in our possession in the legal sense. All critics who condemn its policy in the archipelago on constitutional grounds would be disarmed. Even the returning of escaped slaves to their masters, which we are told has been done when ownership was clearly proved,[1] might not offend against the Thirteenth Amendment; for are the islands even within the "jurisdiction" of the United States, if not in their possession? And if not within their jurisdiction in this, then not in any constitutional sense, and the President in the Philippines is simply the commander-in-chief of our forces abroad.

While a decision that the Philippines are not in our possession might legitimate a temporary policy, it would remove the only theory which gives any moral support to our subjugation of the islands—that since the ratification of the treaty we have been maintaining our sovereign rights against the attacks of insurgents. Are Filipinos "insurgents" if the islands have never been in our possession? Can the definition of rebellion be stretched to cover resistance to a sovereign who has never, by gaining possession, established that visible government in a country which rightfully demands the obedience of its inhabitants? Yet, if the Filipinos in arms were not in insurrection they must have been an independent people, and the charge must be true that in point of law Spain went through the form of ceding rights in the Philippines already irretrievably lost, and that we gained simply her permission to wrangle for possession with the inhabitants. Whilst I have always been opposed to the acquisition of the Philippines, I have ever believed that the United States, being present effectively in the Philippines at the ratification of the Treaty of Paris, did acquire immediately legal possession of the entire archipelago. To maintain this possession in a broad sense it is

[1] See extract from the appendix to Gen. McArthur's late report, printed in N. Y. *Evening Post*, August 16, 1901.

not necessary to insist that it exists for all purposes in localities actually dominated by insurgents. For example, in the Castine[1] case, a port in Maine seized by the British in the war of 1812 was decided to be, during the hostile occupation, no part of the "United States" within the meaning of our revenue laws, and, possibly, the principle of this rule would be applicable in the Philippines. Be this as it may, the principle merely accords an unavoidable recognition of the *status quo* in regard to current affairs; it does not affect the fundamental possession of the absent sovereign. For example, a child born in Castine during the British occupation was, unquestionably, born in the United States.

If the Court shall give due weight to the facts in the Pepke case it will find that, when the diamonds were brought from Manila in the spring of 1900 the city was as completely in our possession as was San Juan in Porto Rico at the date of the transaction in the De Lima case: Then it will follow the rule of that case.

But should the Court assert that conflicts in parts of the archipelago with armed bands of a self-styled government, created a "state of war," it would miscall a struggle which, however serious, was never war with all its incidents, in a legal sense;[2] and, going on to attribute this condition to quiet districts, it would extend arbitrary military power beyond the range of necessity, and therefore beyond its sphere. Even then how could the Court make this fictitious "state of war" in Manila, an excuse for forfeiting goods in Chicago for non-payment of duties under the Dingley Act?

Yet the Court must go further in order to support the policy of the Administration to-day. The situation in the Philippines is different from that of eighteen months ago. Civil government is established and its courts are trying causes. American school teachers are at work. Aguinaldo is in prison, and his government dispersed. Whilst discontent is rife, armed resistance has decreased.

To sustain the Administration to-day the Court must, in some way to be yet explained, declare the archipelago

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[1] U. S. *v.* Rice, 4 Wheaton, 246.

[2] See Annexation, p. 108.

foreign territory because still in a "state of war" which obstructs our legal possession; a war which the Court must assume is continuously waged, until another department of government solemnly proclaims that it is all over. Now the judiciary should recognize executive proclamations as marking, for some purposes, the beginning and the end of war,[1] and sustain executive power when duly exerted for the repression of disorder, but never will respect for a co-ordinate department justify its approval of an assumption of the most searching and despotic of all powers in any place in the jurisdiction of Congress where, plainly, there is no war.

The constitutional powers of the Federal Government for the suppression of insurrection, and the governing of conquered domestic territory were amply vindicated in the Civil War. These powers are ready to its hand in the Philippines. It assumes others for no military necessity, but for the purpose of holding the islands apart from our domestic territory, and ruling and taxing them at discretion.

Coming to the relation of the Constitution to acquired territory we find that all the judges except Justice Brown are of the opinion that the Constitution extends to it of its own force, or, to state this rule in another phrase, the Federal Government will not be relieved from constitutional obligations because it is acting outside the territory of the States.[2] The Constitution "follows the flag" wherever the

[1] See Annexation, p. 107.

[2] That this fundamental rule is as firmly sustained by the dissenting, as by the concurring judges in the Downes case appears in the following general propositions announced by Justice White:

"*First.*—The government of the United States was born of the Constitution, and all powers which it enjoys or may exercise must be either derived expressly or by implication from that instrument. Even then, when an act of any department is challenged, because not warranted by the Constitution, the existence of the authority is to be ascertained by determining whether the power has been conferred by the Constitution, either in express terms or by lawful implication, to be drawn from the express authority conferred or deduced as an attribute which legitimately inheres in the nature of the powers given, and which flows from the character of the government established by the Constitution. In other words, whilst confined to its constitutional orbit, the government of the United States is supreme within its lawful sphere.

"*Second.*—Every function of the government being thus derived from the Constitution, it follows that that instrument is everywhere and at all times potential in so far as its provisions are applicable.

"*Third.*—Hence it is that wherever a power is given by the Constitu-

flag stands for sovereign proprietorship. And we accept cheerfully the oracular caution that only applicable clauses follow, knowing that inapplicable clauses cannot apply, and being assured that the question of applicability is judicial, not political; for the manner of most of the judges in dealing with the Insular Cases rebukes the contention that the

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tion and there is a limitation imposed on the authority, such restriction operates upon and confines every action on the subject within its constitutional limits.

"*Fourth.*—Consequently it is impossible to conceive that where conditions are brought about to which any particular provision of the Constitution applies its controlling influence may be frustrated by the action of any or all of the departments of the government. Those departments, when discharging, within the limits of their constitutional power, the duties which rest on them, may of course deal with the subjects committed to them in such a way as to cause the matter dealt with to come under the control of provisions of the Constitution which may not have been previously applicable. But this does not conflict with the doctrine just stated, or presuppose that the Constitution may or may not be applicable at the election of any agency of the government.

"*Fifth.*—The Constitution has undoubtedly conferred on Congress the right to create such municipal organizations as it may deem best for all the territories of the United States whether they have been incorporated or not, to give to the inhabitants as respects the local governments such degree of representation as may be conducive to the public well-being, to deprive such territory of representative government if it is considered just to do so, and to change such local governments at discretion. * * *

"*Sixth.*—As Congress in governing the territories is subject to the Constitution, it results that all the limitations of the Constitution which are applicable to Congress in exercising this authority necessarily limit its power on this subject. It follows also that every provision of the Constitution which is applicable to the territories is also controlling therein. * * *

"*Seventh.*—In the case of the territories, as in every other instance, when a provision of the Constitution is invoked, the question which arises is, not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable.

"*Eighth.*—As Congress derives its authority to levy local taxes for local purposes within the territories, not from the general grant of power to tax as expressed in the Constitution, it follows that its right to locally tax is not to be measured by the provision empowering Congress "To lay and collect Taxes, Duties, Imposts and Excises," and is not restrained by the requirement of uniformity throughout the United States. But the power just referred to, as well as the qualification of uniformity, restrains Congress from imposing an impost duty on goods coming into the United States from a territory which has been incorporated into and forms a part of the United States. This results because the clause of the Constitution in question does not confer upon Congress power to impose such an impost duty on goods coming from one part of the United States to another part thereof, and such duty besides would be repugnant to the requirement of uniformity throughout the United States. * * *

"From these conceded propositions it follows that Congress in legislating for Porto Rico was only empowered to act within the Constitution and subject to its applicable limitations, and that every provision of the Constitution which applied to a country situated as was that island was potential in Porto Rico."—Justice White in Downes *v.* Bidwell, 182 U. S., 288

actions of the President and Congress in our new possessions lie within that sphere of practical politics wherein Courts must not intrude. While some of these judges are driven into errors of law by apprehensions of political embarrassments, none abdicates the judicial prerogative of squaring public powers with private rights by constitutional standards.

Satisfied that the Constitution is not essentially foreign to Porto Rico and the Philippines, let us consider the applicability of some of its more important provisions.

The provision which confides legislative power to Congress exclusively is a structural law of our Government. This law must apply wherever Congress has jurisdiction, and be it noted that its jurisdiction, that is to say its right to legislate, was extended over Porto Rico and the Philippines the moment they became domestic territory by the ratification of the Treaty of Paris.[1]

Waiving the question as to how far Congress may condone usurpations of legislative power by the executive department by ratifying its acts,[2] we may anticipate a declaration from the Supreme Court in a proper case that in the new, as in the old possessions of the United States the fountain of all authority is law, and that, excepting the applicable clauses of the Constitution, this law must emanate from Congress directly or through competent agents, or else it must be the old law of the place tacitly approved by Congress.

Justice Brown seems unprepared to decide whether those prohibitions and guarantees of the Constitution, which make up what may be called a Bill of Rights, are enforceable in our new possessions. He is unable to overcome an inherited belief in the value of these rights generally, yet hesitates to concede to Porto Ricans and Filipinos an indefeasible right to enjoy them. He is quite sure, at any rate, that these people may rely upon "certain principles of natural justice inherent in the Anglo-Saxon character, and finally disclaims "any intention to hold that the inhabitants " of these territories are subject to an unrestricted power

[1] See Annexation, p. 121.

[2] See Annexation, p. 116.

" on the part of Congress to deal with them upon the " theory that they have no rights which it is bound to " respect."[1]

Fortunately we need not seek historical confirmation of the comfortable assumption that the Anglo-Saxon is incapable of abusing power; nor are we pressed to decide whether statutes can be set aside for repugnancy to "natural justice." Other judges speak with greater assurance. They refuse to deny the Bill of Rights to the islanders, though there seems to be doubt in the minds of some of them whether all its clauses will be found equally applicable. Without discussing this question here we may at least reject what I understand to be the suggestion that an express denial of power may create an obligation of more weight than a simple declaration of principle. It would be improper to hold, for example, that, while the free exercise of religion is assured because the Constitution says: "Congress " shall pass no law" prohibiting it, a loose definition of treason is permissible because the Constitution merely says: "Treason against the United States shall consist only in " levying war against them or in adhering to their enemies, " giving them aid and comfort." And one who would condone this method of interpretation in Manila must accept it in New York, for were there such a difference between denial of power and affirmation of principle it would be innate, and therefore equally effective in all parts of the republic.

The nearly unanimous opinion of the Court affirming the general obligation of the Bill of Rights in our new possessions without regard to differing views as to their precise status is a notable feature of The Insular Cases. It falsifies the impression, gained at home and abroad by misreading Justice Brown's opinion in Downes *v.* Bidwell as the opinion of the Court, perhaps by misjudging his own opinion, that the United States may rightfully govern acquired territory free from any constitutional limitation.

Had the DeLima and Dooley Cases been the only ones before the Court I think the authoritative definition of Porto Rico as domestic territory would be generally

[1] 182 U. S., 283.

accepted as the premise to a conclusion that the island is a part of the "United States" within the purview of important clauses of the Constitution; but the judgment in Downes *v.* Bidwell halts the march of logic. The precise question in this case was whether Porto Rico is a part of that "United States" in which customs taxes must be uniform. Five judges, including Justice Brown, decide the question in the negative, and though, as we have seen, the dissonance of their reasons leaves their decision without an authoritative opinion, the reasons themselves require examination.

Justice Brown has been charged with inconsistency in defining Porto Rico as domestic territory in the DeLima and Dooley cases, and in this case as territory outside the "United States" of the Constitution. Now these definitions are essentially inconsistent, but they are quite reconcilable when reached by the processes of their sponsor. Approaching the subject from the side of public law he finds, very properly, that Porto Rico has become part of our domestic territory. Approaching the subject from the side of our peculiar constitutional law he is enmeshed in the theory that the Constitution was ordained for States of the Union alone, and so he must exclude this island from the "United States" of the Constitution. But this theory is condemned by all the other judges, who establish the converse theory so firmly that Justice Brown may be expected to follow Chief Justice Marshall's example, when overruled in the bankruptcy case,[1] and accept it as "the settled law of the Court." Then, if he adheres to his definition of "domestic" territory adopted by the Court in the DeLima and Dooley cases, will he not accept the conclusion, reached by all the other judges in the Downes case, that when territory becomes domestic it is a part of the "United States" within the purview of the uniform tax clause of the Constitution?

Justice White, speaking for Justice Shiras and Justice McKenna, says: "The sole and only issue * * * is, "whether the particular tax in question was levied in such "form as to cause it to be repugnant to the Constitution.

[1] See *supra*, p. 438.

" This is to be resolved by answering the inquiry, had Porto " Rico, at the time of the passage of the act in question, " been incorporated into, and become an integral part of the " United States?"[1]

This question turns wholly upon the word "incorporated." In Justice White's opinion there may be three stages in the transformation of foreign territory into a State of our Union—acquisition, incorporation and admission to statehood. By acquisition the United States assume sovereign proprietorship. By admission the land becomes the seat of a self-governing commonwealth. These processes are familiar; but what is "incorporation" here wedged between them? One who fails to recognize this middle stage as established in our polity will not be charged with inexcusable ignorance. Indeed Justice White himself finds the strongest suggestion for his position in a few phrases unearthed from the executive correspondence in regard to a single transaction in our history--the purchase of Louisiana. In this transaction Jefferson seems to approve this theory of "incorporation," but the occasional opinions of statesmen are at best of uncertain value in jurisprudence, and it is well known that Jefferson was greatly perplexed in regard to the legal effect of the acquisition he was determined to make. And if the draftsmen of the Louisiana Treaty had Jefferson's views in mind when they used the word "incorporated," in the Third Article, they have failed to establish them, for Chief Justice Marshall, speaking for the Supreme Court, in New Orleans and De Armas,[2] treats the promise to "incorporate" as a promise to admit to statehood—a meaning which, I venture to say, would have passed unquestioned a few years ago. In view of Marshall's opinion Justice White is not warranted in saying "The minutest " analysis, however, of the treaty [the Louisiana Treaty] " fails to disclose any reference to a promise of statehood, " and hence it can only be that the pledge made referred to " incorporation in the United States."[3] Justice White's theory of "incorporation" cannot claim recognition on the score of usage. It is new to our jurisprudence, and, like

[1] 182 U. S., 299.

[2] 9 Peters, 224, 232.

[3] 182 U. S., 325.

any other novel suggestion, it should not be accepted without positive proof of worth.

How is "incorporation" supposed to be effected? Acquired territory will not glide into incorporated territory. Neither lapse of time nor strengthening ties of intercourse will accomplish the organic change. This change must be so definite that a court will be able to decide that a person is a citizen of the United States because of his birth in territory which on such a day became part of the United States; or that a New York merchant need no longer pay duties on imports from a certain locality, because on such a day it had become part of the United States.

Evidently "incorporation" must be effected by some law, and Justice White insists that the treaty-making body is incompetent to effect this result without the co-operation of Congress.[1] In support of his position he intimates that the treaty-making body cannot create citizens of the United States. But this, by the way, does not seem to be good law: Chief Justice Marshall, speaking for the Court, said of the Florida Treaty: "This treaty * * * admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of citizens of the United States." He is of the opinion, at any rate, that the Treaty of Paris was not intended to make Porto Ricans citizens, inasmuch as it reserved their "political status" for the determination of Congress. Yet the treaty also reserved their "civil rights," and Justice White does not hesitate to invest the islanders with important constitutional rights. I am sure he will find the treaty-making body quite as impotent to deprive these human beings of "political status" as to withhold from them all "rights."

These comments on the treaty-making power betray confusion of thought in attempting to determine the status of acquired territory from the status of its inhabitants. United States citizenship is, by the Constitution, acquired in two ways; by naturalization, and by birth within the United States. Citizenship by birth is the inevitable and involuntary consequence of being born within territory which, by

[1] 182 U. S., 312.

[1] American Ins. Co. *v.* Canter, 1 Peters, 511, 542.

some antecedent and unrelated act, has been made a part of the United States. Applying this principle to the case of persons born in Porto Rico and the Philippines after the ratification of the Treaty of Paris, we find that we must first determine the status of the territory in order to fix the status of the persons.

Citizenship by naturalization is conferred upon aliens by the voluntary act of the Federal Government either through the application of an individual who craves the benefit of the Naturalization Act, or through what is called "collective naturalization," whereby the Government invests a body of people with citizenship without necessarily respecting their preferences. This collective naturalization is evidently in the minds of the judges who, by denying its operation in the case of Porto Rico conclude that the island is not part of the United States. This reasoning is imperfect. While we may determine the status of persons by our relation to the land they live in, we do not determine our relation to the land by our treatment of persons. To illustrate: I believe that upon the ratification of the Treaty of Paris the Porto Ricans became citizens, but not necessarily because of my opinion that the same act brought the island within the United States for, without affecting our relation to the territory, we might have left all the people, as we left part, to choose between Spain and the United States; in point of law, we might even have arranged that Spain should retain the allegiance of all her subjects. But, the republic having assumed proprietorship over the islands, I attribute citizenship to the islanders who, divested of Spanish allegiance, owe full allegiance to their new sovereign.[1]

[1] See Annexation, page 61. Professor Westlake, in a letter criticising the use of "peaceable Boers as a defense against train wreckers" by forcing them to ride on the trains, gives his opinion of the status of the Boers after the annexation of their country by Great Britain: "The annexation has converted the Transvaal and Orange burghers into subjects of the King, and although, very properly, we do not press the change of *status* harshly on those who are still fighting against it, the relations between the King and those who accept his Government by living peaceably under it are not governed by the laws of war but by the law of the land. We claim their allegiance, as we prove by arresting Dr. Krause on a charge of treason, and their rights must accompany their allegiance. Therefore, to put a peaceable ex-Boer on a railway train as a defense would be the same thing, both legally and morally, as to do it to the natural-born British subject of oldest standing in Johannesburg. If it be suggested that the victims might be

I conclude that the theory of "incorporation" of territory is not promoted by discussing the law of citizenship.

Returning to the main line of the argument for incorporation we look for the sign by which Congress is supposed to express its intention to "incorporate" acquired territory into the United States. In the case of lower Louisiana this sign is discovered in the Act of March 2, 1805, providing that the inhabitants of Orleans Territory "shall be "entitled to all the rights, privileges and immunities secured "by said ordinance [Ordinance of 1787 for the government "of the Northwest Territory], and now enjoyed by the "people of the Mississippi Territory." The sign for upper Louisiana is the Act of June 4, 1812, creating the Territory of Missouri, by which, says Justice White, "the inhabitants "of the territory were accorded substantially all the rights "of the inhabitants of the Northwest Territory." The sign for Florida is the Act of 1822 containing substantially the provision of the Missouri Act. All these signs are based on the erroneous theory that the status of the people in our territory determines its relation to the United States. If "incorporating" all Porto Ricans and Filipinos would bring our new possessions into the United States, what would be the effect of "incorporating" only the islanders who speak English?

In the case of California the earlier signs of "incorporation" are absent, so a new one must be sought for, and it is found, not in any particular law of Congress, but in an implied assent of Congress to an "incorporation" provided for in the Treaty: And a like sign is supposed to mark the "incorporation" of Alaska. Justice White's observations on

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taken from the concentration camps, the dilemma arises—are the persons in those camps free to leave them or not? If they are, their remaining there brings them within the category of persons who have accepted a change of *status* by living peaceably under the King's Government. If they are not, we have no right to assume against them that their option, if they had any, would be exercised in such a manner as to make them still enemies.

"In these circumstances it is unnecessary to enter into the question whether the laws of war allow an invader to use the peaceable inhabitants of an occupied district as defenses on railways against train-wreckers."—*London Times*, September 23, 1901.

these annexations[1] are most unsatisfactory, for he fails to indicate the efficient act of Congress which from his standpoint is required to bring territory within the United States and make its people citizens.[2]

Justice Gray agrees "in substance" with Justice White, but in a personal opinion he applies the theory of "incorporation" only to territory acquired after war, thus avoiding, perhaps, responsibility for the views of his associates regarding the Louisiana purchase; and his sign of "incorporation" seems to be the establishment of a civil government by Congress at the end of a "transition period," during which military authority is perforce supreme. Now in point of

[1] "After the ratification of the treaty various laws were enacted by Congress, which in effect treated the territory as acquired by the United States, and the executive officers of the government, conceiving that these acts were an implied or express ratification of the provisions of the treaty by Congress, acted upon the assumption that the provisions of the treaty were thus made operative, and hence incorporation had thus become efficacious.

"Ascertaining the general rule from the provisions of this latter treaty and the practical execution which it received, it will be seen that the precedents established in the cases of Louisiana and Florida were departed from to a certain extent; that is, the rule was considered to be that where the treaty, in express terms, brought the territory within the boundaries of the United States and provided for incorporation, and the treaty was expressly or impliedly recognized by Congress, the provisions of the treaty ought to be given immediate effect. But this did not conflict with the general principles of the law of nations which I have at the outset stated, but enforced it, since the action taken assumed, not that incorporation was brought about by the treaty-making power wholly without the consent of Congress, but only that as the treaty provided for incorporation in express terms, and Congress had acted without repudiating it, its provisions should be at once enforced."—Justice White, Downes *v.* Bidwell, 182 U. S., 335.

[2] "If an act of Congress be necessary to convert a foreign country into domestic territory, the question at once suggests itself, what is the character of the legislation demanded for this purpose? Will an act appropriating money for its purchase be sufficient? Apparently not. Will an act appropriating the duties collected upon imports to and from such country for the benefit of its government be sufficient? Apparently not. Will acts making appropriations for its postal service, for the establishment of lighthouses, for the maintenance of quarantine stations, for erecting public buildings, have that effect? Will an act establishing a complete local government, but with the reservation of a right to collect duties upon commerce, be adequate for that purpose? None of these, nor all together, will be sufficient, if the contention of the Government be sound, since acts embracing all these provisions have been passed in connection with Porto Rico, and it is insisted that it is still a foreign country within the meaning of the tariff laws. We are unable to acquiesce in this assumption that a territory may be at the same time both foreign and domestic.' —Justice Brown, De Lima *v.* Bidwell, 182 U. S., 198.

fact the transfer of territory from one state to another is usually followed by a "transition period"—a period of more or less inconvenience and perplexity during which the new sovereign is engaged in the task of establishing relations with its new people. And it is conceded that the law will not hold the new sovereign to too strict an account while it is endeavoring to bring order out of inevitably confused conditions.[1] But there is no reason why temporary difficulties in local administration should affect fundamental and unrelated matters; why, for example, a child born in Porto Rico should, because of these difficulties, be denied citizenship, and a New York merchant be obliged to pay duties on imports from the island.

So long, however, as Justice Gray defines a transition period as the time between the acquisition of territory and the establishment of civil government therein by Congress, his position is consistent, whatever we may think of its merit. But when we should expect him to declare that the "transition period" in Porto Rico was ended by the Foraker Act establishing civil government he prolongs the period indefinitely, saying, "If Congress is not ready to construct a complete government for the conquered territory, it may establish a temporary government which is not subject to all the restrictions of the Constitution;" and he places the government of Porto Rico in the latter class. Now the fact that the government of Porto Rico is "temporarily" provided is not important in a constitutional sense, because in this sense all territorial governments are temporary, being alterable by Congress at pleasure,[2] and this particular government may endure for years. Then in what respect is this government incomplete? It has its governor, its judges of local and federal courts, its legislature. It is structurally perfect; it seems to be efficient, and wherein it differs from a complete government is not made clear. If Justice Gray deems it incomplete because, in his opinion, "it is not subject to all the restrictions of the Constitution" (that is to say, apparently, because Congress in the Foraker Act treats Porto Rico as outside the United States in the matters of citizenship and taxation), his sign

[1] See Annexation, p. 116.

[2] See Annexation, p. 125.

of "incorporation" would seem to be not the establishment of civil government at all, but some action by Congress in regard to these other matters.

Are we to infer that, in his opinion, the Constitution is so far at the disposition of Congress that the effectiveness of some of its restrictions in acquired territory depends on the phrasing of an act creating a civil government therein?

At present the theory of "incorporation" lacks the authority of a legal principle, for it is discredited by the opinion and judgment of the Court in the De Lima case. At present it does not convey an intelligible suggestion to the statesman, for the method of effectuating it is not made clear. Nevertheless the theory cannot be dismissed merely because of these shortcomings, for a substantial minority of the judges present it as their sole argument for refusing to accompany the judges who dissent in the Downes case in their fearless recognition of the breadth of constitutional rights and duties. What powerful motives have begotten this imperfect, but obstructive argument? Supposing it can be made intelligible, is it worth clarifying? Supposing it can be so commended to another judge as to induce him to recant his opinion that Porto Rico is domestic territory, is it worth commending? After the United States have assumed sovereignty over land and people, do their interests demand that the land and the people shall for an indefinite time, possibly forever, remain foreign? Answering in the affirmative, the sponsors of the incorporation theory disclose the apprehensions which have provoked its fabrication.

These apprehensions, are mainly, the disturbance of our economic system, the extending of citizenship to obnoxious persons, the hampering of our activity in war, and the difficulty, if not the impossibility of ridding ourselves of undesirable possessions. Grave apprehensions certainly; but are they at once so real and so cogent as to force the Republic to break its rule of commercial unity, and to introduce class distinctions among its people?

Consider the apprehension in regard to citizenship.

The day before the declaration of war in 1898 the Porto Rican subjects of the King of Spain, upon complying with our general laws, could have entered the United States and begun the process of acquiring citizenship. The day after the conclusion of peace they lost this privilege because they were no longer aliens. Shall they, then, and their children too, be denied citizenship because, forsooth, the United States have become the sovereign of their country? We invited them, as aliens, to come here and become citizens. Shall we go there and deny them citizenship because we gain their allegiance?

This gross discrimination is not manifest, of course, in the case of the Filipinos, for the brown, like the yellow race, is excluded from our statutory color scheme of naturalization, which includes only white and black, but there is really no better reason in law for setting up new standard in the Philippines than there is in Porto Rico.

Justice McKenna appears to dread the "nationalization of savage tribes";[1] but this fear is groundless, for such tribes will be classified with our Indian population.[2] Between the Moros and the Igorrotes on the one hand, and the Filipinos of Manila on the other there may be, indeed, persons difficult to classify. Perhaps an accurate segregation of tribal peoples will leave out many half-civilized persons. With these, as with Filipinos of the better sort, we are undoubtedly in the political fellowship born of a common allegiance to the United States. An unwelcome fellowship, because it means the entrance of an inferior race into the Republic, but, having embraced it, there is no reason why we should shrink from calling our fellow liegemen citizens. It is conceded that important provisions of the Bill of Rights enure as well to the liegeman as to the citizen; indeed it might be difficult to make any substantial distinction in favor of the latter. Then a citizen is not, as such, a member of the political body of the Republic—the electoral body—which is composed exclusively of persons who reside in the States of the Union and meet the requirements of the various State laws conferring the suffrage.

[1] 182, U. S., 219.

[2] See Annexation, p. 57.

True, the Fifteenth Amendment of the Constitution forbids the States to withhold the suffrage from any "citizen of the United States" because of "race, color or previous condition of servitude"; and a Filipino may enter a State in the exercise of his undoubted right of free movement, and, if a citizen, may claim the benefit of the Amendment. But if the State does not wish to give him the suffrage, means for withholding it can probably be devised, though we shall be able to speak more definitely regarding the method after the Supreme Court shall have passed upon State laws intended to disfranchise negro citizens of the United States. If the State does wish to give him the suffrage, it may do so whether he be a citizen or not.[1] There is nothing in the Constitution of the United States to prevent a State from inviting an immigrant to go from the wharf to the polls and vote for presidential electors.

Comprehending that a "citizen of the United States" is merely one of that vast body of people of both sexes and all ages who owe allegiance to, and enjoy protection from the Republic as their lawful sovereign, it would seem that "fellow liegeman" and "fellow citizen" are not classifications to quarrel over. But Justice White anticipates a peculiar embarrassment from attributing citizenship to the people of our new territory. Prepossessed by the idea that territory is "incorporated" by calling its inhabitants "citizens," he disparages the ability of the United States to sell it, or even to surrender it to its people with suitable conditions regarding administration. He seems to think that if the Philippines are part of the United States, we cannot sell them to a foreign government, which no one now contemplates, nor recognize a local government under our protectorate, to which some look forward as the best settlement of the Philippine question.[2]

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[1] See Annexation, p. 55.

[2] "True, from the exigency of a calamitous war or the necessity of a settlement of boundaries, it may be that citizens of the United States may be expatriated by the action of the treaty-making power, impliedly or expressly ratified by Congress.

"But the arising of these particular conditions cannot justify the general proposition that territory which is an integral part of the United States may, as a mere act of sale, be disposed of. If, however, the right to dispose

He discusses the question of sale from the premise that selling United States territory means selling citizens, and would accuse those who affirm the power to sell land of holding "that all citizenship of the United States is precarious " and fleeting, subject to be sold at any moment like any " other property. That is to say, to protect a newly acquired " people in their presumed rights it is essential to degrade " the whole body of American citizenship." * * * "In " conformity to the principles which I have admitted," he says, "it is impossible for me to say at one and the same " time that territory is an integral part of the United States " protected by the Constitution, and yet the safeguards, " privileges, rights, and immunities which arise from this " situation are so ephemeral in their character that by a " mere act of sale they may be destroyed."[1]

But has not Justice White already conceded the general effectiveness of the Bill of Rights in the Philippines and thereby attributed to the Filipinos a substantial part of these " safeguards, privileges, rights and immunities "? Would he

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of an incorporated American territory and citizens by the mere exertion of the power to sell be conceded, *arguendo*, it would not relieve the dilemma. It is ever true that where a malign principle is adopted, as long as the error is adhered to it must continue to produce its baleful results. Certainly, if there be no power to acquire subject to a condition, it must follow that there is no authority to dispose of subject to conditions, since it cannot be that the mere change of form of the transaction could bestow a power which the Constitution has not conferred. It would follow then that any conditions annexed to a disposition which looked to the protection of the people of the United States or to enable them to safeguard the disposal of territory would be void; and thus it would be that either the United States must hold on absolutely or must dispose of unconditionally.

"A practical illustration will at once make the consequences clear. Suppose Congress should determine that the millions of inhabitants of the Philippine Islands should not continue appurtenant to the United States, but that they should be allowed to establish an autonomous government, outside of the Constitution of the United States, coupled, however, with such conditions providing for control as far only as essential to the guarantee of life and property and to protect against foreign encroachment. If the proposition of incorporation be well founded, at once the question would arise whether the ability to impose these conditions existed, since no power was conferred by the Constitution to annex conditions which would limit the disposition. And if it be that the question of whether territory is immediately fit for incorporation when it is acquired is a judicial and not a legislative one, it would follow that the validity of the conditions would also come within the scope of judicial authority, and thus the entire political policy of the government be alone controlled by the judiciary."—Justice White, Downes *v.* Bidwell, 182 U. S., 317.

[1] 182 U. S., 315.

justify a sale of persons thus highly endowed merely because they are not called "citizens"? If selling territory involves selling persons, is not the moral question concerned with the sale of human beings without regard to class distinctions? The corrective for this apprehension is that there is no such thing an ownership, nor, therefore, as a sale of human beings. Territory is the subject of sale, and upon its transfer the inhabitants not allowed, or not accepting the right to retain their old allegiance owe allegiance to the new sovereign.[1] If we bought the Philippines, we did not buy the Filipinos: selling them, we should not sell the Filipinos.

Acceptance of the Philippines as part of the United States will not preclude the future recognition of a protected state, if that shall prove desirable. Given the power to dispose of territory, there is nothing in our Constitution to prevent the making of suitable treaty stipulations with its new government in regard to its administration. The making of these stipulations and their enforcement would lie within the sphere of foreign relations,[2] and they need not contravene any constitutional direction or limitation affecting the domestic concerns of the republic.

Disastrous results are apprehended from an indiscriminate recognition of acquired territory as within the sphere of our uniform revenue system. I have considered this subject elsewhere[3] and have found no insurmountable obstacles to recognizing the constitutional rule of uniformity in such territory, There may be embarrassment to a protective tariff system framed to meet the supposed requirements of our country as it was bounded before the Treaty of Paris, but millions of Americans condemn the whole doctrine of protection, and no one can defend the enforcement of this doctrine, avowedly based upon hostility to, or at best on a selfish disregard of foreign countries against any part of our domestic territory. There is now reason to hope that the general policy of protection is on the eve of abandonment. In the address which proved to be his political testament President McKinley said: "A system which provides a "mutual exchange of commodities is manifestly essential

[1] See Annexation, p. 59.
[2] See Annexation, p. 155.
[3] See Annexation, p. 83.

" to the continued and healthful growth of our export trade. " We must not repose in fancied security that we can forever " sell everything and buy little or nothing. If such a thing " were possible it would not be best for us, or for those with " whom we deal. * * * The period of exclusiveness is " passed. The expansion of our trade and commerce is " the pressing problem. Commercial wars are unprofitable. " A policy of good-will and friendly trade relations will " prevent reprisals. Reciprocity treaties are in harmony " with the spirit of the times; measures of retaliation are " not."[1] These words forecast a more liberal trade policy toward strangers. Is it decent to covet the power to discriminate against a section of our own people?

In voicing the specific apprehensions we have noted, the judges merely ruffle the surface of the tremendous question provoked by the Treaty of Paris. Whether we call the Filipino a " citizen," what shall become of the Dingley Tariff Act, are matters of subsequent and incidental interest to the question whether the acquisition of countries like the Philippines is in harmony with the highest interests and purposes of the Republic.

Here the judges apprehend startling consequences of holding that when we acquire territory we make it part of the United States. " If the authority by treaty is limited as " suggested," says Justice White, " then it will be impossi- " ble to terminate a successful war by acquiring territory " through a treaty, without immediately incorporating it " in the United States. Let me, however, eliminate the case " of war and consider the treaty-making power as subserving " the purposes of the peaceful evolution of national life. Sup- " pose the necessity of acquiring a naval station or a coaling " station on an island inhabited by people utterly unfit for " American citizenship and totally incapable of bearing their " proportionate burden of the national expense, could such " island, under the rule which is now insisted upon, be " taken? Suppose, again, the acquisition of territory for an " inter-oceanic canal, where an inhabited strip of island on " either side is essential to the United States for the preser-

[1] Address at Buffalo, September 5, 1901.

" vation of the work. Can it be denied, that if the require-
" ments of the constitution as to taxation are to immediately
" control, it might be impossible by treaty to accomplish
" the desired result?"[1] Justice McKenna says of the prin-
ciple that an acquisition of land brings it within our general
taxing district: " It takes this great country out of the
" world and shuts it up within itself. It binds and cripples
" the power to make war and peace. It may take away
" the fruits of victory, and if we may contemplate the fruits
" of disaster it may take away the means of mitigating that.
" All those great and necessary powers, are as a consequence
" of the argument, limited by the necessity to make some
" impost or excise 'uniform throughout the United States.'
" * * * The terms which may be granted or received
" [upon a cession of territory] would be to a certain and
" important extent predetermined. Neither we nor the
" conquered nation would have any choice in the new
" situation—could make no accommodation to exigency,
" would stand bound in a helpless fatality. Whatever
" might be the interests, temporary or permanent, whatever
" might be the condition or fitness of the ceded territory,
" the effect on it or on us, the territory would become part
" of the United States with all that implies."[2] Justice
Brown, by the way, argues in the same vein in support of
his opinion that congressional action is necessary to effec-
tuate the Constitution in outlying territory. " A false step
" at this time," he says, " might be fatal to the development
" of what Chief Justice Marshall called the American Em-
" pire. Choice in some cases, the natural gravitation
" of small bodies towards large ones in others, the result
" of a successful war in still others, may bring about con-
" ditions which would render the annexation of distant
" possessions desirable. If those possessions are inhabited by
" alien races, differing from us in religion, customs, laws,
" methods of taxation and modes of thought, the adminis-
" tration of government and justice, according to Anglo-
" Saxon principles, may for a time be impossible; and the
" question at once arises whether large concessions ought
" not to be made for a time, that, ultimately, our own

[1] Downes *v.* Bidwell, 182 U. S., 311.

[2] De Lima *v.* Bidwell, 182 U. S., 218.

" theories may be carried out, and the blessings of a free " government under the Constitution extended to them. " We decline to hold that there is anything in the Constitu- " tion to forbid such action." [1]

In Justice Harlan's sober rebuke to the last of these arguments we find an answer to all, " Whether a particular race will or will not assimilate with our people, and whether they can or cannot with safety to our institutions be brought within the operation of the Constitution, is a matter to be thought of when it is proposed to acquire their territory by treaty."[2] Disrespect for this prudent counsel may some day imperil the welfare, perhaps the existence of the United States; respect for it will never injure their true interests in any quarter of the world.

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[1] Downes *v.* Bidwell, 182 U. S., 286.

[2] Continuing, Justice Harlan says: " A mistake in the acquisition fo territory, although such acquisition seemed at the time to be necessary, cannot be made the ground for violating the Constitution or refusing to give full effect to its provisions. The Constitution is not to be obeyed or disobeyed as the circumstances of a particular crisis in our history may suggest the one or the other course to be pursued. The People have decreed that it shall be the supreme law of the land at all times. When the acquisition of territory becomes complete, by cession, the Constitution necessarily becomes the supreme law of such new territory, and no power exists in any Department of the Government to make " concessions " that are inconsistent with its provisions. The authority to make such concessions implies the existence in Congress of power to declare that constitutional provisions may be ignored under special or embarrassing circumstances. No such dispensing power exists in any branch of our Government. The Constitution is supreme over every foot of territory, wherever situated, under the jurisdiction of the United States, and its full operation cannot be stayed by any branch of the Government in order to meet what some may suppose to be extraordinary emergencies. If the Constitution is in force in any territory, it is in force there for every purpose embraced by the objects for which the Government was ordained. Its authority cannot be displaced by concessions, even if it be true, as asserted in argument in some of these cases, that if the tariff act took effect in the Philippines of its own force, the inhabitants of Mindanao, who live on imported rice, would starve, because the import duty is manyfold more than the ordinary cost of the grain to them. The meaning of the Constitution cannot depend upon accidental circumstances arising out of the products of other countries or of this country. We cannot violate the Constitution in order to serve particular interests in our own or in foreign lands. Even this Court, with its tremendous power, must heed the mandate of the Constitution. No one in official station, to whatever department of the Government he belongs, can disobey its commands without violating the obligation of the oath he has taken. By whomsoever and wherever power is exercised in the name and under the authority of the United States, or of any branch of its Government, the validity or invalidity of that which is done must be determined by the Constitution." 182 U. S., 384.

Some of the judges who reject this counsel are preoccupied in making, as they think, the best of a bad bargain. In truth, are they not encouraging a policy of indiscriminate expansion by contriving means for avoiding some unwelcome results? They miss the point that the great evils of an improvident acquisition accompany the acquisition itself: The after questions of citizenship and tariffs are comparatively unimportant.

All the judges who perceive in this counsel an hindrance to the progress of the Republic are distracted by imaginary fears. Even with the singular case of the Philippines before us we must refuse to admit that the United States have ever been, or ever will be compelled to acquire territory without first weighing advantage with disadvantage, without considering the effect upon our institutions. Accepting the restraint of this perpetual counsel of prudence we shall not bind ourselves in "helpless fatality," or take ourselves "out of the world," or "stand helpless in the family of nations." Extravagant expressions which, assuredly, are not taken seriously out of court!

If in peace we desire a naval station, or the control of a canal, we may gain sufficient jurisdiction for our purpose without making unwholesome additions to our domestic territory. Nor need such additions follow successful war. Indeed, Justice White would commend his doctrine of acquisition without "incorporation," on the ground that its rejection would still leave the United States free to exercise dominion over territory without making it part of the United States, in other and, in his opinion, less satisfactory ways. "It seems to me," he says, "it is not open to "serious dispute, that the military arm of the Government of "the United States may hold and occupy conquered terri- "tory without incorporation for such length of time as may "seem appropriate to Congress in the exercise of its discre- "tion. The denial of the civil power to do so would not "therefore prevent the holding of territory by the United "States if it was deemed best by the political department of "the Government, but would simply necessitate that it "should be exercised by the military, instead of by the civil "power."[1] Again: "It cannot be denied that under the rule

[1] 182 U. S., 342.

" clearly settled in Neely *v.* Henkel,[1] the sovereignty of " the United States may be extended over foreign territory " to remain paramount until in the discretion of the political " department of the government of the United States it be " relinquished. This method, then, of dealing with foreign " territory would, in any event, be available. Thus, the " enthralling of the treaty-making power, which would result " from holding that no territory could be acquired by treaty " of cession without immediate incorporation, would only " result in compelling resort to the subterfuge of relinquish- " ment of sovereignty, and thus indirection would take the " place of directness of action—a course which would be " incompatible with the dignity and honor of the Govern- " ment."[2]

It is true that these courses may be open to the United States at the close of a successful war, perhaps a resort to the second in time of peace is conceivable, and we are not now concerned to discuss their propriety. Had the Treaty of Paris dealt with Porto Rico and the Philippines as with Cuba, they, like Cuba, would lie beyond our domestic territory. Had the Treaty merely secured the relinquishment of Spanish sovereignty over the islands without, as in the case of Cuba, pledging the United States to a temporary occupation, or had it been silent in regard to them, we would certainly in Porto Rico, and I think throughout the Philippines, have acquired a possession for an indefinite term good against the world; still, the territory would not thereby have become part of the United States in any domestic sense. And this separation would have been maintained in the case of the Philippines had the archipelago been left to its people under our protectorate.

None of these courses was taken; and in the course actually chosen the positive reason appears for including the islands within the United States.

Justice White says: " The whole argument in favor of " the view that immediate incorporation followed upon the

[1] 180 U. S., 109, defining the peculiar relation of the United States to Cuba.

[2] 182 U. S., 344.

" ratification of the treaty in its last analysis necessarily comes " to this: Since it has been decided that incorporation flows " from a treaty which provides for that result when its pro- " visions have been expressly or impliedly approved by Con- " gress, it must follow that the same effect flows from a treaty " which expressly stipulates to the contrary, even although " the condition to that end has been approved by Congress. " That is to say, the argument is this: Because a provision " for incorporation when ratified incorporates, therefore a " provision against incorporation must produce the very con- " sequence which it expressly provides against."[1]

This cleverly confused statement is not the argument for maintaining that upon the exchange of ratifications of the Treaty of Paris the ceded territory became part of the United States. The real argument rejects entirely the novel theory of "incorporation."[2] It affirms that upon the exchange of ratifications the United States became entitled to full sovereign rights over the ceded territory, whether by force of the Treaty itself, or by its recognition by Congress in the act appropriating money to redeem its pledges is immaterial. These rights were instantly perfected by possession. Thereupon the Federal Government was invested with precisely the same power over this territory as over Alaska and Oklahoma, which, unquestionably, are within the United States. But it is asserted here that the Federal Government has power to fix the status of ceded and accepted territory, and in the Treaty has disclosed its intention to hold the islands apart from the United States.

To support the principle of this assertion Justice White refers to what he calls "The general rule of the law of nations, by which the acquiring state fixes the status of acquired territory * * *."[3] This rule as stated seems to suggest a confusion of ideas. Admitting that a state, having opportunity, may change the status of outlying territory it certainly exerts its power by acquiring the territory:

[1] 182 U. S., 341.

[2] "Great stress in thrown upon the word 'incorporation,' as if it had some occult meaning," says Chief Justice Fuller, 182 U. S., 373. "I am constrained to say," says Justice Harlan, "that this idea of 'incorporation' has some occult meaning which my mind does not apprehend. It is enveloped in some mystery which I am unable to unravel." 182 U. S., 391.

[3] Downes *v.* Bidwell, 182 U. S., 310.

"Acquired territory" means land brought within the complete sovereignty of the acquiring state; the phrase itself denotes status, and this status must be like that of other territory under the same sovereignty. And to this rule of general application I add a special one imposed by our Constitution—that our Congress is the Congress of the United States and of no other country, and the boundaries of its territorial jurisdiction are the boundaries of the United States.[1]

When we realize that in order to determine the status of our new possessions we should rely upon the Constitution, and upon the cessionary clauses of the Treaty of Paris and our acts of acceptance as the controlling factors, we perceive the irrelevancy of the incidental clauses which are supposed to bear upon the subject. Justice McKenna's statement that the Treaty "expressly declares that the status of the ceded territory is to be determined by Congress,"[2] is very careless. The Treaty "expressly declares" nothing of the kind. He refers, presumably, to the clause reserving "the political status and civil rights" of native islanders for the determination of Congress, which is a very different thing. Whatever this clause may mean to persons, it has no effect upon land.[3] Nor is the normal effect of the cessionary clauses perverted by any other provisions which, this effect being maintained, may be superfluous, or even unconstitutional. If, for example, under the ten-year agreements Spain cannot send "Don Quixote" into any of the islands, or a cask of wine into the Philippines free of duty without violating our constitutional rule of uniformity of duties, then the agreements must fall as incidental mistakes (if, indeed, a way can be found to have them condemned by the Courts), rather than thwart the far-reaching consequences of a cession and acceptance of territory.

Perhaps our Commissioners at Paris would have liked to exclude the islands from the United States, possibly they hoped they would do so, but had they been convinced of their duty and ability to acquire territory without

[1] See Annexation, pp. 26, 27.

[2] 182 U. S., 214.

[3] See *supra*, p. 453.

bringing it within the United States, surely they would have spoken plainly, and not left this vital matter to the perilous chance of argumentative definition.

III.

The Supreme Court is clearly of opinion that the Constitution is law in acquired territory, so far as its provisions are applicable; and this is, perhaps, as satisfactory a generalization of principle as the advocates of constitutional government in our new possessions should expect. Will the Court give point to this generalization when the opportunity comes to enforce a particular limitation?

The Court has decided that acquired territory is domestic territory. Will it follow the true leading of this decision and, discarding the conflicting minority arguments that prop the judgment in Downes *v.* Bidwell, declare the commercial unity of all domestic territory?

Proclaiming the vigor of our Constitution and defining acquired territory the Court faces the right road. Will it turn into the wrong one?

These encomiums are well deserved, yet the Downes judgment, and the apprehensions, perplexities, ambiguities and errors which mar some of the opinions, compel the queries.

Happily, the line of cleavage between approving and dissenting judges in the Downes case does not separate Republicans from Democrats. Whilst the judges were concerned directly with Porto Rico in the Insular Cases decided, their minds were intent on the Philippines in discussing the status of persons; and two-thirds of the Democrats seem ready to claim for the brown man the status their party once denied to the black; while two-thirds of the Republicans would deny to the brown man the status their party conferred upon the black. Apparently the line does not separate "broad" from "strict" constructionists of the Constitution, in any former significance of these terms; nor apologists, from opponents of the acquisition of the Philippines; nor, perhaps, protectionists from free traders, though "protection" plays a part in some of the opinions.

The Chief Justice and Justices Harlan, Brewer and Peckham are here distinguished from their brethren by a truer appreciation of the everlasting duty of the Republic —throughout its dominions exemplifying that faith in its principles which shall promote unity and strength at home, and make it respected, imitated and feared abroad.

The united opinion of these judges, so strongly held, so calmly expounded, should yet prevail against the discordant arguments of the majority of the Court, who, at present, are too plainly disturbed by the Philippine adventure to exercise that serene judgment which supports the monuments of law.

"It must be remembered," says Chief Justice Fuller, at the close of his opinion in the Downes case, "that, as "Marshall and Story declared, the Constitution was framed "for ages to come, and that the sagacious men who framed "it were well aware that a mighty future waited on their "work. * * * They may not indeed have deliberately "considered a triumphal progress of the nation, as such, "around the earth, but, as Marshall wrote: 'It is not enough "'to say that this particular case was not in the mind of "'the convention when the article was framed, nor of the "'American people, when it was adopted. It is necessary "'to go farther, and to say that, had this particular case "'been suggested, the language would have been so varied "'as to exclude it, or it would have been made a special "'exception.' This cannot be said, and, on the contrary, "in order to the successful extension of our institutions, "the reasonable presumption is that the limitations on the "exertion of arbitrary power would have been made more "rigorous."

CARMAN F. RANDOLPH.